Supreme Court of the United States

OCTOBER TERM, 1933

No. 117

HUNTER A. GIBBES, Representing Himself and all Other Depositors of the Central Union Bank of South Carolina, etc., APPELLANT,

versus

SIMPSON J. ZIMMERMAN, Individually and as Conservator of the Central Union Bank of South Carolina et al., APPELLEES

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

ARGUMENT FOR APPELLEES

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INTRODUCTORY SUMMARY

This appeal challenges the constitutionality of the South Carolina Emergency Banking Act of March 9, 1933.

This Act was passed for the primary purpose of providing for a period for the examination of the banks of the State so as to determine which of the said banks might safely reopen, and vested the Governor with plenary powers over the banks of the State and with power among other things to suspend payments by the said banks and prohibiting all suits against the said banks for a period of eighteen months. The South Carolina Supreme Court upheld the Act as a valid exercise of the police power of the State.

It is submitted that the said Act was passed for the lawful purpose of promoting the safety of banking in the State of South Carolina and of protecting the rights of the depositors therein, and reasonably tended to accomplish that purpose, and hence was a valid exercise of the police power of the State, both on account of the nature of the business regulated, to wit, banking, and also on account of the emergency of the time.

Noble State Bank v. Haskell, 219 U. S. 104, 255 L. ed. 112;

Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128;

Witt, Rec. v. Peoples State Bank of S. C., 166 S. C. 1; 6 R. C. L. 187-189

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Buchanan v. Warley, 245 U. S. 59, 69 L. ed. 149;

Block v. Hirsch, 256 U. S. 135, 65 L. ed. 865;

Moreover the police power of the State extends to and embraces the right if need be not only to interfere with appellant's normal property rights, but also to impair the obligation of his contract with the bank in question.

6 R. C. L. 187-189; 6 R. C. L. 347-348;

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 U. S. (L. ed) 989;

Butchers' Union Slaughter-House Co. v. Crescent City Live Stock Landing Co., 111 U. S. 746, 4 S. Ct. 652, 28 U. S. (L. ed.) 585;

St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 U. S. (L. ed) 611, affirming 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161;

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 U. S. (L. ed) 979;

Northern Pac. Ry. Co. v. Minnesota, 208 U. S. 583, 28 S. Ct. 341, 52 U. S. (L. ed.) 630;

Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 S. Ct. 529, 52 U. S. (L. ed) 828, 14 Ann. Cas. 560.

Furthermore, inasmuch as appellant claims the Bank should be liquidated, the whole effect of the Act is to change the method for the appointment of the receiver from appointment by the Court upon nomination of the depositors to appointment by the Governor, which is a permissible change of remedy without depriving appellant of his property or impairing the obligation of his contracts.

Sturges v. Crowinshield, 4 Wheat. 122, 4 U. S. (L. ed) 529;

Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 U. S. (L. ed.) 773;

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6 R. C. L. 347-348

6 R. C. L. 356-357

STATEMENT AS TO THE FACTS

This appeal challenges the constitutionality of the Emergency Banking Act passed by the South Carolina Legislature on March 9, 1933.

This is an appeal from a decision of the South Carolina Supreme Court filed May 11, 1933, upholding the said Act and granting a writ of prohibition against a suit instituted by the appellant on April 11, 1933, in violation of the said Emergency Banking Act, and which attacked the constitutionality of the said Act.

Act Passed March 9, 1933, to Provide for Examination of Banks to Determine Which Banks Could Safely Reopen

The basic facts out of which this case has arisen are largely matters of public knowledge and are practically undisputed (though there are some minor inaccuracies in appellant's pleadings), and are briefly as follows:

At the time of the inauguration of President Roosevelt on March 4, 1933, the banking situation throughout the United States and in the State of South Carolina was in a state of chaos. Many cities and states had declared moratoria against payments by banks, and banks everywhere were suspending operations and closing their doors. Up to that time the banks in South Carolina had not generally been closed or suspended operations, but after the President of the United States declared a national banking holiday, Governor Blackwood of South Carolina, who was in Washington at the time of the inauguration, issued a proclamation closing all the banks in the State of South Carolina, including the Central Union Bank of South Carolina, until further notice. This proclamation went into full effect on Monday, March 6, 1933.

These are largely matters of common knowledge and need not be repeated here. We adopt the language of the South Carolina Supreme Court as giving a fair description of these general conditions:

"We need not dwell here upon the serious conditions which prevailed in banking circles prior to and at the time of the

passage of the 1933 Act, and which still prevail, to a greater or less degree. These conditions are matters of common knowledge and existed, not only in this State, but throughout the nation. Even the solvent banks, because of general conditions, were unable to properly function. Many banking institutions were loaded with assets that could not be liquidated. Gold in large quantities was withdrawn for purposes of hoarding; lack of public confidence in the soundness of the banks caused the abnormal withdrawal of deposits; and a nightmare of uncertainty and panic threatened with disaster the business life of the country. It was only firm and timely action of the President of the United States and of the Governors of the several States which prevented the entire and immediate collapse of our financial system and the wrecking of our banking institutions everywhere. The causes that brought about these conditions are not here matters for consideration. We are concerned only with the undisputed existence of a serious emergency, imperatively requiring that something be done for the protection and safety of the public and for the common good; and the situation was of such nature as to require heroic action. It is evident that the Legislature, in its enactment of the 1933 law, intended to meet this emergency and thereby to provide a remedy and a method of administering banking affairs for the purpose of protecting, as far as possible, the property and rights of the public generally. Some of the banks were sound, but closed temporarily because of existing conditions; others, while not perhaps absolutely sound, were in such condition that they might by reorganization be made to function normally; while still others might be insolvent,—and these being, in the circumstances, a menace to the whole system, required such special consideration and treatment as their peculiar conditions might indicate, in order to obviate or lessen the general danger which they created." (Tr. p. 34-35).

In view of these circumstances the South Carolina Legislature, which was then in session, passed the Emergency Banking Act which was approved on the 9th day of March, 1933.

(Tr. p. 12-16, ff. 21-26), giving the Governor of the State broad powers over all the state banks.

This Act vested the Governor of the State of South Carolina with "plenary powers" over the state banks in the State of South Carolina (Sec. 1), specifically authorizing him among other things (Sec. 2) to extend the time for the payment of deposits (a) and to promulgate necessary regulations to enable such banks to comply with the Federal regulations for banks (d) and to order the liquidation of banks in the interest of the depositors (e). The Act further authorized the Governor (Sec. 3) "to make all necessary rules and regulations" with respect to banks, and provided (Sec. 4) that "all persons, firms or corporations are hereby prohibited, while the Governor is in control of the banks, * * *, from instituting any legal proceedings of any nature whatever against any bank, * * *, without first obtaining the written approval of the Governor", authorized the appointment by the Governor of a Board of Bank Control, (Sec. 7) and provided that the powers granted by the Act should cease eighteen months from the date of the Act (Sec. 10). The Act also contains a good many other provisions relative to the operation and control of the said Bank and banking laws, which, however, do not seem to be particularly pertinent here.

Acting under the authority of this Act the Governor of the State of South Carolina appointed a Board of Bank Control. Thereafter the Governor acting with the approval of the Board of Bank Control at one of its first meetings promulgated a regulation analogous to the Federal regulations providing for the appointment of Conservators in order to conserve the assets of any bank for the benefit of the depositors and other creditors thereof. (Tr. p. 16-20, ff. 26-31). This regulation authorized the receipt of special trust deposits by such banks while under the control of Conservators and also provided rules for reorganizing (ff. 28-29) and for reopening (f. 30) such banks.

It provided in effect also that the Conservators should take possession of the assets of the Bank and should have "all the rights, powers and privileges now possessed by or hereafter

given Receivers of insolvent state banks" and should be subject to the duties and liabilities of receivers.

This regulation further provided that the Governor should cause such examination of the affairs of such banks to be made as he deemed necessary, and that he might thereafter order the banks to be reopened or reorganized or liquidated as should be found advisable in the interest of the depositors and creditors.

Under the authority of the foregoing Act and pursuant to the said regulation the Governor of the State of South Carolina appointed the appellee Simpson J. Zimmerman as Conservator of the Central Union Bank of South Carolina, the said Simpson J. Zimmerman having been an officer (but not a stockholder) of the said Bank. The said Conservator thereupon took possession of the assets of the said bank and proceeded to administer the said bank pursuant to the said Act and regulation. The Conservator acting under the Governor and the Board of Bank Control was having an audit made and was preparing to issue notices to the stockholders and directors of the said Bank so as to determine whether the Bank should be reopened or reorganized or liquidated, but before the completion of the said audit or the holding of said meetings (Tr. p. 4-5, f. 9) the appellant instituted the suit below mentioned.

On April 11, 1933, Appellant Instituted Suit for Receiver Attacking Constitutionality of Act

On April 11, 1933, the appellant instituted a suit in the Court of Common Pleas for Richland County in the State of South Carolina on behalf of himself and other depositors of the Central Union Bank for the purpose, as therein stated (F. 20), of having the said Emergency Banking Act declared null and void "insofar as the same undertakes to prevent plaintiff and other depositors of the Central Union Bank from bringing and prosecuting this action" (Par. 4), and for the purpose of having a receiver appointed for the said bank (Par. 7) and for the enforcement and collection of the stockholders liability of the stockholders of said bank (Par. 8). In the complaint the

appellant had alleged many of the facts above stated, and particularly alleged (Par. 6, f. 17) that under the Act the bringing of any action against the Bank itself without the approval of the Governor was prohibited, and that he had asked the Governor for authority to bring the suit but the said request had been refused; and that he had been denied access to the records of the Bank, but that according to his information there was practically no chance of reopening the bank or of its reorganization, and that it should be liquidated (Par. 9) and that it was in "danger of insolvency" (Par. 14). The complaint also alleged (Par. 11, f. 18, p. 10), that the said Act was unconstitutional for the reasons that it enabled the Conservator to take possession of his property without an opportunity to be heard and that it deprived him of his contractual right under the constitution of the State to enforce the stockholders' liability.

At the same time the appellant obtained a rule to show cause from the Presiding Judge of the Fifth Judicial Circuit directing the appellees to show cause on the 4th day of May, 1933, why the prayer of the complaint should not be granted and pending the said return enjoining all persons from proceeding against the said Bank or any of its assets in any way except in the said proceeding. (Tr. p. 6-7, f. 13).

Prohibition Suit Instituted April 12, Writ Granted May 11, 1933

The appellees thereupon on April 12, 1933, filed their petition with the Supreme Court of South Carolina in the original jurisdiction for a writ of prohibition against the said suit instituted in the Court of Common Pleas by the appellant, and obtained an alternative writ of prohibition against the said suit returnable before the Supreme Court on April 14, 1933 (Tr. p. 1-6). In this suit the appellees alleged the proceedings in regard to the above mentioned suit, and alleged among other things that the petitioners therein were at the time having an audit made and taking the proper steps to determine whether the Bank should be reorganized or liquidated, but that

the said audit had not yet been completed and that it was impossible to determine what disposition would be made of the Bank, and that the pendency of the said suit was prejudicial to the interest of the said Bank and to its depositors and creditors. (Tr. 4-5 .....). It was also alleged that the above mentioned suit instituted by the appellant was in direct violation of the terms of the said Act, and hence that the writ of prohibition should be issued restraining the further prosecution of the said suit. (Tr. 5-6 .....).

Attached to this petition was a copy of the regulations promulgated by the Governor acting under the terms of the said Act. (Tr. p. 16-20). To this alternative writ the Resident Judge of the Fifth Circuit filed a return, and the appellant filed a return and motion to dismiss and also a return and answer (Tr. p. 21-27).

Appellant's return and answer repeated many of the allegations contained in his suit which he had instituted in the Court of Common Pleas for the appointment of a Receiver and also contained a qualified charge that the said Act was unconstitutional, the language of the return being that "if the purpose was by said Act, or by the administration thereof, to take from the respondent and other creditors and depositors their rights under the Constitution and laws of the United States and of this State, after such rights were vested and fixed, then the said Act is null and void and cannot be and should not be enforced or upheld." (Tr. p. 22-23). There was no direct or specific charge as to which provision of the Act or what interpretation thereof deprived the appellant of his constitutional rights or of what particular constitutional rights. The return and answer did not contain any specific showing as to whether the gravamen of his complaint was that the Act was not being properly interpreted and administered by the appellees or that the Act on the whole or in its essential provisions was unconstitutional.

This matter was argued on April 14, 1933, before the Supreme Court of South Carolina which thereafter handed down its decision on May 11, 1933, upholding the said Act and grant-

ing the writ of prohibition as prayed for. In its decision the South Carolina Supreme Court held that banks are peculiarly subject to state regulation (Tr. p. 31-33, ff. 45-46), and particularly that the provision of the Act prohibiting the institution of suits against the bank—which was the principal point of attack by the appellant in the argument before the Supreme Court—was a justifiable exercise by the state government under the existing circumstances of its police power for the general welfare of its citizens. (Tr. p. 33-35, ff. 46-47).

There was no petition for a rehearing after this decision, but the appeal therefrom was filed and allowed on May 18, 1933.

Subsequent Legislation and Proceedings Providing for Liquidation of Central Union Bank

Since the decision of the Court was rendered and this appeal was allowed there have been certain developments in connection with this situation, which are matters of public record and which though not incorporated in the record herein we conceive should be brought to the attention of this Court.

On May 16, 1933, the South Carolina Legislature passed an Act as stated in its title to "Provide for the Liquidation of Banks or Banking Institutions after a Conservator has been Appointed". The purpose of the Act is indicated in the title. A copy of this Act is attached hereto in the appendix as Exhibit "A".

The Act also as will be seen gives the Conservator "the right to apply to a Court of competent jurisdiction for direction and instruction on questions arising in the liquidation of any such bank".

Also on the 22 day of June 1933, the Governor and the Board of Bank Control passed an order ordering the Central Union Bank into liquidation with the said Simpson J. Zimmerman, appellee herein, as Conservator-Receiver. A copy of the said order is attached hereto in the appendix as Exhibit "B".

Pursuant to the authority contained in the above mentioned Act the Conservator of the said Central Union Bank thereafter instituted on the 26 day of June, 1933, a suit in the Court of Common Pleas for Richland County for instructions and guidance in the administration of the affairs of the bank. That suit is now pending in that Court and all the depositors, including the appellant herein, have the right to go into that suit and assert all of their rights therein.

Also on the 3rd day of October, 1933, the Governor and the Board of Bank Control passed another order appointing J. Roy Barron as a co-conservator of the said Bank. And subsequently on the 1st day of November, 1933, the Governor and the Board of Bank Control declared it necessary to resort to the stockholders liability for the benefit of the depositors and directed the Conservator-Receivers to call for and enforce collection by suit or otherwise. Such call has been made under an appropriate order from the Court, dated November 2, 1933.

Appellant contends in his argument that the Act is unconstitutional for the alleged reasons:

(1) That the Act deprives him of his property without due process of law in that (a) it authorizes the Governor to appoint a Conservator of the bank without notice to him; and (b) authorizes the conservator to carry on the business of the bank in a limited way, in receiving trust deposits without his consent or approval. (Arg. p. 4-6).

(2) That the Act impairs the obligation (1) of his contractual right under the Constitution of the State of South Carolina to enforce the double liability of the stockholders, and (b) of his right to sue the Bank for his deposit, at least for a period of eighteen months. (Appellant's Arg. p. 7-11).

ARGUMENT

I.

The Emergency Banking Act of 1933 Valid Under the Police Power of the State

> "The police power of a State extends to the regulation of the banking business, and even to its prohibition, except on such conditions as the state may prescribe."
>
> *Noble State Bank v. Haskell*, 219 U. S., 104, 55 L. Ed., 112.

> "To regulate the banking business so as to reduce to a minimum failures in this branch of business enterprise is not only clearly within the powers of the legislative department of the government, but it may also be said to be an imperative duty for the legislature to enact laws for the prevention, as far as possible, of bank failures."
>
> *In re: Pittman v. Nevada*, 99 Pac., 700, 22 L. R. A. (N. S.), 269.

It is respectfully submitted that the said Emergency Banking Act of March 9, 1933, was passed for the purpose of providing an opportunity for an investigation as to the condition of the banks in the State of South Carolina, and of thereby conserving the assets of the depositors in the said banks, and reasonably tended to accomplish that purpose, and hence was a valid exercise of the police power of the State, particularly in view of the serious emergency existing at the time of its passage, under the settled principle that the business of banking is peculiarly subject to State regulation under the police power, and that all regulations adopted in the exercise of that power will be upheld where they reasonably tend to promote a lawful purpose.

Noble State Bank v. Haskell, 219 U. S. 104, 255 L. ed. 112;
Engel v. O'Malley, 219 U. S. 128, 55 L. ed. 128;
Shallenberger v. First State Bank, 219 U. S. 114, 55 L. ed. 117;
Sherman v. Smith, 66 U. S. 587, 17 L. ed. 163;
Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452;
Witt, Rec. v. Peoples State Bank of S. C., 166 S. C. 1
In re: Pittman v. Nevada, 99 Pac. 700, 22 LRA NS. 269
Augusta Bank v. Earle, 13 Pet. 519, 10 L. ed. 274
State v. Scranton Title & Guaranty Co. Ida 152, P. 189
6 R. C. L. 187-189, 347-348; 355-357
Cooley's Constitution of Limitations, 7th Ed. p. 555-556.
German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 58 L. ed. 1011 (At 1020);
State Savings and Commercial Bank v. Alden Anderson, 203 U. S. 267, 59 L. ed. 1489;
Title Guaranty & Surety Co. v. Idaho, 240 U. S. 136, 60 L. ed. 566;
Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865 (at 870);
Jackman v. Rosenbaum Co. 260 U. S. 22, 67 L. ed. 107 (at 111);
Farmers & Merchants Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. ed. 1157 (at 1164);
Bushnell v. Leland (Conn. 1897) 17 S. Ct. 209, 164 U. S. 684, 41 L. ed. 598;
In re: Chetwood (Cal. 1897) 17 S. Ct. 385, 165 U. S. 443, 41 L. ed. 782;
Buchanan v. Warley, 245 U. S. 59, 69 L. ed. 149

Act Passed to Provide for Examination of Banks to Determine Which Banks Solvent

It is obvious that the dominating purpose of the passage of this Act was to provide a period for the investigation of the

condition of banks generally in the State of South Carolina so as to conserve their assets for the benefit of the depositors and creditors, and to prevent all of the banks from being immediately thrown into receivership and closed by reason of the near panic then existing in the minds of the people generally.

This dominating purpose is shown both by a consideration of the terms of the Act itself and of the regulations immediately adopted by the Bank Board and by the Governor pursuant thereto and also by the decision of the South Carolina Supreme Court construing and stating the purpose of the Act. The real purpose was to provide a reasonable opportunity and a method for someone to make an investigation so as to determine which of the banks were perfectly sound and might be safely reopened and which of the banks might by careful handling be reorganized, and which of the banks were in fact insolvent and had to be immediately liquidated. In the state of panic then existing it is obvious that this was a proper purpose and object to be accomplished by the State Legislature.

The doubt and uncertainty which existed at the time as to the condition of all the banks, as was stated by the Supreme Court in its decision (R 34-35) tended to endanger the safety and usefulness even of the perfectly solvent and safe banks. As was stated by the Supreme Court, "A nightmare of uncertainty and panic threatened with disaster the business life of the country," and the Act was intended to meet this emergency and thereby provide a method of administering the banking affairs of the state during this period of investigation, for the purpose of protecting, as far as possible, the property and rights of the public generally.

Under these circumstances it is respectfully submitted that not only was it the right, but the duty of the Legislature to take such means as were within its power to protect the interest of the people and the property and business rights of its citizens by the enactment of appropriate legislation to that end, "To regulate the banking business so as to reduce to a minimum failures of this branch of business enterprise" as

was stated by the Supreme Court of Nevada in the case of *In Re: Pittman* above cited, 99 Pac. 700, 22 LRA, NS, NS 269, **"is not only clearly within the powers of the legislative department of government but it may also be said to be an imperative duty for the legislature to enact laws for prevention, as far as possible, of bank failures."**

That this was in fact the purpose of the passage of this Act will, we apprehend, be conceded in this case.

It is submitted also that this being the purpose, and such purpose being in every sense highly lawful, the Act fully met the test for the proper exercise of the police power as frequently stated by this Honorable Court (See *Buchanan v. Worley*, 245 U. S. 59, 62 L. ed. 149) that "the means adopted reasonably tend to accomplish a lawful purpose."

It is apparent, it is submitted, from a consideration of the Act itself and also from the regulations promulgated by the Governor and the Bank Board that the Act reasonably tended to accomplish the purpose for which the said Act was passed as above stated. The Act, as has been shown, placed the entire supervision and control of the banks in the hands of the Governor of the State of South Carolina. The Governor had been elected by the whole people and certainly it can not be denied that he was the appropriate person in whom to place these powers. The permission granted to the Governor to suspend the time of the payment of deposits was also necessary in order to enable him to make a proper investigation as to the condition of the banks and to conserve the assets of such banks pending such investigation. Also the provision (Sec. 2, sub. c) authorizing the Governor to permit the creation of special trust account subject to withdrawal was advisable in the interest of the people in view of the necessity for some banking facilities (Cf. *Noble State Bank v. Haskell, supra*) and also in the interest of keeping the banks in operation in a limited sense as a going concern. Likewise the power granted (Sec. 2, sub.d) to the Governor to promulgate rules and regulations so as to enable the State Banks to comply with the Federal regulations was obviously proper because of the interconnec-

tion between the State banks and the national banks. Similarly the power contained in (Sec. 2, sub. e) authorizing the Governor to look into and determine whether the overhead expenses exceeded the net income of the banks and if need be to reduce such overhead expenses or order liquidation was properly designed toward the same end.

Also the provision contained in Sec. 4, as to which complaint is made particularly by the appellant prohibiting the institution of suits against such banks while the Governor is in control without obtaining the written approval of the Governor was, it is respectfully submitted, obviously necessary and proper for the same purpose. If, notwithstanding the purpose of the Act which was to give the Governor an opportunity to investigate the condition of the banks, any and every depositor or creditor of such banks should immediately have the right to institute suits against such banks for the purpose of getting judgment or throwing them into the hands of receivers, it is clear that the major purpose of the Act would have been immediately defeated. It is common knowledge that as soon as a bank is closed for any purpose or fails to meet any of its obligations, there is immediate fear that the bank is insolvent which may cause a run and precipitate receivership suits. In fact, the very charge that a bank is insolvent, as was made by the appellant in this case in his suit in the Court of Common Pleas, seriously and adversely affects the credit of any bank and generally gives to a bank a blow from which it cannot recover. It is a criminal offense in South Carolina to charge a bank with insolvency (Code 1932, S. 1230). As was stated by the Supreme Court of South Carolina in its opinion, had it not been for the incorporation into the Act of this provision there would doubtless have been many suits instituted for the purpose of having receivers appointed for the winding up of the affairs of each of the state banks, "which would result in chaos and confusion in the reorganization and rehabilitation of the banking system of the State and thereby defeat the very purpose of the Act." (R. 35, f. 47).

Also the provision of the Act authorizing the Governor to appoint a Board of Bank Control (Sec. 7, R. p. 16) and prohibiting stockholders from transferring their stock (Sec. 9, sub. a, R. p. 16) and the further provision of the Act providing for a cessation of the powers thereby granted after 18 months (Sec. 10, R. p. 16) were all obviously proper and reasonable tending to accomplish the lawful purpose above shown.

It is also submitted that the regulation immediately adopted by the Governor was likewise a proper means to accomplish the said end. This regulation as above shown, and as will be seen from a reference to the said regulation (R. p. 16-20), provides for the appointment by the Governor of conservators who were given the powers and responsibilities of receivers. This provision and also the provision for the Governor to have an examination of the financial condition of the bank and for the termination of the conservatorship, and the provision for the reorganization of the bank (R. p 18, f 28-29) and likewise the provision for the reopening of the bank (R. p 19, f 30) were all, it is submitted, reasonably calculated to accomplish the same lawful purpose.

The action of the Governor in appointing appellee Zimmerman, who was a former officer of the bank and therefore presumably familiar with its affairs, as a conservator for the said bank, and the subsequent action of appellees in having an audit made of the affairs and condition of the bank, in sending out notice to stockholders and directors thereof so as to determine whether the bank should be reorganized or be reopened (R. p 4, f 9) were all reasonably calculated to accomplish the same purpose.

It is submitted, therefore, that the purpose of the passage of the Act was clearly lawful and that the means adopted and authorized in the Act and adopted by appellee to accomplish that lawful purpose reasonably tended to accomplish that purpose and, hence, under the foregoing authorities the said Act was a valid exercise of the police power of the State. These

principles are overwhelmingly supported, established and confirmed, it is submitted, by all the authorities.

Authorities Show Banks Subject to Regulation Under the Police Power

In the above cited case of *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, which is a leading case on this subject and which has been frequently cited with approval by this Honorable Court and other Courts, it was held that (Syllabus, p. 113) "The police power of a State extends to the regulation of the banking business, and even to its prohibition, except on such conditions as the state may prescribe."

In that case an assessment based upon average daily deposits for the purpose of creating a depositors guarantee fund had been levied by the State of New York upon the appellant bank. It was contended that this assessment deprived the appellant bank of its property and property rights without due process of law. It was held, however, by this Court that the said statute was a valid exercise of the police power.

In the decision of this Honorable Court rendered by Mr. Justice Holmes, it was said that "We must be cautious about pressing the broad words of the 14th Amendment to a arily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the law making power." * * *

"It may be said in a general way," continued the Court, "that the police power extends to all the great public needs. *Canfield v. United States*, 167 U. S. 518, 42 L. ed 260, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned

by usage, or held by the morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of these conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If, then, the legislature of the state thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. Even the primary object of the required assessment is not a private benefit, as it was in the cases above cited of a ditch for irrigation or a railway to a mine, but it is to make the currency of checks secure, and by the same stroke to make safe the **almost compulsory resort of depositors to banks as the only available means for keeping money on hand.** The priority of claim given to depositors is incidental to the same object, and is justified in the same way. The power to restrict liberty by fixing a minimum of capital required of those who would engage in banking is not denied. The power to restrict investments to securities regarded as relatively safe seems equally plain. It has been held, we do not doubt rightly, that inspections may be required and the cost thrown on the bank. *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S., 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255. **The power to compel beforehand, cooperation, and thus, it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized, if government is to do its proper work, unless we can say that the means have no reasonable relation to the end.** *Gundling v. Chicago*, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633." * * * "The question that we have decided is not much helped by propounding the further one, whether the right to engage in banking is or can be made a franchise. But as the latter question has some bearing on the former, and as it will have to be considered in the following cases, if not here, we will dispose of it now. It is not an-

swered by citing authorities for the existence of the right at common law. There are many things that a man might do at common law that the states may forbid. He might embezzle until a statute cut down his liberty. We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary, we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection, and the above described cooperation are necessary safeguards, this Court certainly cannot say that it is wrong."

The same principle was announced and applied by this Honorable Court in the above cited cases of *Shallenberger v. First State Bank of Holstein*, 219 U. S., 114. 55 L. ed. 117, and *Engel v. O'Malley*, 219 U. , 128, 55 L. ed. 128, in the latter of which it was held that a statute requiring the appellant to obtain a license from the Comptroller of the State of New York in order to engage in the banking business did not deprive him of his property without due process under the 14th Amendment, and that such statute was the proper exercise of the police power of the state. In this case the Court again speaking through Mr. Justice Holmes said that the *Noble State Bank case* has established "that the state may regulate that business, and may take strong measures to render it secure." (55 L. ed. at 136)

The above cited case of *Noble State Bank v. Haskell* has also been cited with approval and followed in the following among many other subsequent cases of this Honorable Court:

German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 58 L. ed 1011 (At 1020)

State Savings and Commercial Bank v. Alden Anderson, 203 U. S. 267, 59 L. ed. 1489

Title Guaranty & Surety Co. v. Idaho, 240 U. S. 136, 60 L. ed. 566 (This case affirming the above case cited by State of Idaho 27 Idaho, 5, 152 Pac. 189.)

Block v. Hirsh, 256 U. S. 135, 65 L. ed. 865 (at 870) (This case upholding the emergency legislation regulating the letting of buildings in the District of Columbia)

Jackman v. Rosenbaum Co. 260 U. S., 22, 67 L. ed. 107 (At 111)

Farmers and Merchants Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. ed. 1157 (At 1164) (Upholding a state statute regulating the banking business under the police power "for the purpose of protecting the public and promoting the general welfare.")

In the above cited case of *Witt, Receiver v. Peoples State Bank of South Carolina* it was held by the South Carolina Supreme Court that a South Carolina statute providing for preference under certain conditions, among the creditors of insolvent banks, did not deprive the other creditors of their property without due process of law, or any violation of the equal protection clause of the Federal or State constitutions.

The decision in this case was based largely upon the decisions of this Honorable Court as to the peculiar nature of banks, "The regulation of banks and legislation as to insolvent banks," said the Supreme Court of South Carolina in that case, "are special matters peculiarly within the province of legislative action. 2 R. C. L. 379; 12 C. J. 116; 7 C. J. 10; 480; *Noble State Bank v. Haskell*, 219; U. S. 104, 111, 31 S. Ct. 186; 55 L. ed., 112; 32 L. R. A. (N. S.) 1062 Ann. Cas. 1912. 1912-A, 487. 'One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits, to such an extent do checks replace currency in daily business. If then, the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it.' *Noble State Bank v. Haskell*, 219 U. S. at page 111, 31 S. Ct. 176, 188, 55 L. ed. 112, 32 L. R. A. (N. S.) 1062, Ann. Cas. 1912-A, 487."

In that case it was also held that this statute creating preference in favor of certain classes of creditors did not impair the contractual rights of the depositors to sue the stockholders on their stockholders liability, this point being based largely upon the above cited case of *Sherman v. Smith*, 66 U. S. 587, 77 L. ed. 168, in which it was held that the legislature might by subsequent legislation place a double liability on stockholders though none existed at the time of their stock subscription.

The same principles are generally recognized and applied by the other general authorities.

"The business of banking is a proper subject for regulation under the police power of the state because of its nature and the relation which it bears to the fiscal affairs of the people and the revenues of the state; and the police power of a state extends even to the prohibition of engaging in the business of banking except upon such conditions as the state may prescribe." * * * "The actual supervision of banking is usually vested in some officer of the state who may properly be vested with visitorial powers and authorized to investigate into the management, the mode of conducting business, and the solvency of banks or bankers, and to take possession of their assets and to wind up their affairs when this appears necessary for the protection of depositors." 7 C. J. 480-482. Citing and abstracting many authorities.

We also call especial attention to the language of the Supreme Court of North Dakota in the case of *North Dakota State v. Woodmansee*, I. N. D. 246, 46 N. W. 970. 11 L. R. A. 420.

"It is true", said the Court, "that it has been held that the provisions relative to personal liberty found in our constitution might be violated by the enactment of a statute which operated to deprive a citizen of the right to pursue a lawful trade or avocation. But on the other hand, it is conceded that the business of banking by reason of the very intimate relations to the fiscal affairs of the people and the

revenues of the state, is and has ever been considered a proper subject of legislative control and strictly within the domain of the internal police power of every state. **As a matter of fact, we have been unable to find an authority, and we have searched diligently, which has ever questioned the right of the legislature in the exercise of police power to regulate, restrain and govern the business of banking.** As a matter of precedent and authority, the legislative prerogative, in the exercise of its police power in promoting the public safety, not only to regulate and restrict the business of banking, but also to grant the right to one class and to prohibit to others or even to forbid it altogether, has never been questioned in the courts, and the legislatures of other states have frequently exercised the right of supreme control over the business."

Administrator for Banks Validly Appointed by Civil Authorities

It is also established by the authorities cited in support of the above statements in Corpus Juris that a depositor or a creditor of a bank is not deprived of his property without due process of law by not having the opportunity to participate in the appointment of the official of the state who takes charge of the assets of said bank. See particularly *State v. Scranton Title Guaranty Co.* (Ida.) 152, P. 189, and *In Re: Mandel*, 224 Fed. 642.

In the above cited case of *State v. Scranton Title Guaranty Co.* it was said, "In their motion for a directed verdict appellants also raised the question of the validity of section 73 above quoted. They contend that the law under consideration contemplates that a court proceeding must first be instituted by the bank commissioner before he takes possession of the books, records and assets of the bank or trust company found by him to be involved or which has unlawfully refused to pay the depositors, that the theory of respondents is, in effect, that it is the duty of the bank commissioner upon becoming satis-

fied of one or more of the above mentioned facts, to immediately take charge without instituting a proceeding in court to procure judicial authority so to do. It is appellant's further contention that if said sections 72 and 73 are construed to authorize the commissioner to seize the property and wind up the affairs of the bank without any judicial proceedings, then these sections are in violation of the fourteenth amendment of the Constitution of the United States and of section 13 art. 1; and sections 2 and 13, art. 5 of the Constitution of Idaho. We are not in accord with appellant's contention."

The above case from the Idaho Court was subsequently affirmed by this Honorable Court in a very emphatic opinion (240 U. S. 136, 60 L. ed 566) in which it was held in effect that merely to state the contention of the appellant is to demonstrate its want of merit.

> "The proposition under the 14th Amendment relied upon," said the Court in rendering its decision, "is that, consistently with that Amendment, the state had not the power to put upon the bank commissioner the duty of closing the bank in case, on examination, it was found to be insolvent, since such authority, consistently with due process, could only have been exerted after judicial proceedings to ascertain the facts, and the awarding of relief accordingly. The pleadings leave it exceedingly doubtful whether the question thus urged was presented in either of the courts below, and it is, besides, obvious from the opinion of the court below that it considered that the only question raised under the Constitution of the United States was a contention that there would result a want of due process if the state statutes conferred upon an administrative officer the authority to liquidate the affairs of the insolvent bank without judicial proceedings. We say this because, in its opinion, the court observed that if that was the contention, it was irrelevant, as the statutes did not authorize liquidation except as a result of judicial proceedings, although they did impose upon the bank commissioner the duty, after he found a bank

to be insolvent, to close its doors and prevent the further transaction of business until, in the orderly course of procedure, a judicial liquidation might be accomplished. But assuming, as it is now insisted in argument was the case, that the question relied upon was the repugnancy of the state statute to the due process clause of the 14th Amendment, because power was conferred upon an administrative officer in the event of insolvency to close the doors of a bank without awaiting judicial proceedings, and that the observation on that subject by the court below was an adverse decision of such question, we think it suffices to state the proposition to demonstrate its want of merit. *Noble State Bank v. Haskell*, 219 U. S. 104, 55 L. ed. 112, 32 L. R. A. (N. S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; *Shallenberger v. First State Bank*, 219 U. S. 114, 55 L. ed. 117, 31 Sup. Ct. Rep. 189.

Dismissed for want of jurisdiction."
(60 L. ed. p. 569)

Likewise in the case of *In Re: Mandel*, 224 Fed, 642 it was said "The business of private banking is certainly subject to general regulation, such as that of the New York Banking Law, and where the superintendent of banks seized possession of the goods of Mandel because he thought his bank unsafe, it may have been an incident, but it was only an incident, of the right of public control, that he lost a possession that he might have protected against direct process in a criminal prosecution. The incident is one of the misfortunes of insolvency if it follows crime. *In re Harris* 221 U. S. 274, 55 L. ed. 732."

We adopt the language of the Supreme Court of Nevada in the above cited case of *In re Pittman v, Nevada*, 99 Pac. 700, 22 LRA (N. S.) 269, (in which a statute making it a crime for the officer of the bank to receive deposits while the bank was insolvent) as containing an excellent statement of the

reasons for banks being peculiarly subject to state regulations.

"That the business of banking is a lawful business in which it is the inherent right of every citizen to engage will not be questioned. It is a business, however, with which the general public welfare is most clearly identified. **Money is said to be the very life blood of the nation. The banking business has grown to be a part and parcel of our financial system, and it is so regarded by both the Federal and state governments.** The great bulk of business transactions, instead of being effected by an actual transfer of money, is accomplished through the medium of bank checks and drafts. Indeed, it would be next to impossible to carry on the great business transactions of this country, which aggregate hundreds of billions of dollars annually, without the aid of a well organized banking system. It needs no extended argument to establish the fact that the banking business is in a class by itself. The assertion of the fact should be sufficient. While the business of banking may not be prohibited, it may be regulated, and it is of the highest importance to the public welfare that it be regulated by wise legislation. It is a matter of common knowledge that the deposits in the banks of the country exceed many times the total amount of actual money within the country. The solvency of the banks of the country must of necessity rest upon the value of their securities, rather than upon the actual amount of cash which may be within their vaults, very much the same as the wealth of the nation or state is represented, not merely by the amount of money within the treasury or in circulation among the people, but mainly upon the vast resources of the country of every character and description.

"Common experience has abundantly demonstrated that the prosperity of the country is very largely influenced by public confidence in its banking institutions. Anything which tends to shake that confidence and causes depositors in banks to withdraw their deposits, produces contraction in business which may result, and at times has resulted, in panics which

have brought ruin and disaster to thousands and seriously affected the welfare and happiness of the public generally for greater or less periods of time. If a person or corporation engaged in mercantile pursuits, for example, should fail, the injurious results are limited. Such failure does not tend to shake confidence in the business soundness of other similar enterprises. The case is different with banking institutions. The suspension of a bank in any locality causes depositors in other banks in the same locality to become suspicious of the solvency of the bank with which they may be dealing. Withdrawals follow, and if they are sufficiently numerous, a second bank may be forced to, at least a suspension. Every bank suspension tends in a greater or lesser degree to shake confidence in other like institutions. If it happens to be a large and well-known bank which fails, the greater will be the extent of the injury, which its faliure will produce upon other banks, not only in the locality in which the suspended bank is situated, but also in distant places. Thus may be brought about a financial panic of nation-wide extent.

"To regulate the banking business so as to reduce to a minimum failures in this branch of business enterprise is not only clearly within the powers of the legislative department of the government, but it may also be said to be an imperative duty for the legislature to enact laws for the prevention, as far as possible, of bank failures."

The foregoing authorities it is respectfully submitted establish beyond a per adventure that the banking business by reason of its nature and intimate relation to the welfare of the people is peculiarly subject to regulation in the highest degree by the state in the exercise of the police powr.

Act Also Justified by Emergency Existing at Time of its Passage

Also it is submitted that the foregoing principle of the police power is applicable in the case at bar not only on account of the nature of the business concerned—that is, of

banking, which necessarily and vitally affects the welfare of the people at all times,—but also on account of the great emergency existing at the time of the passage of the Act. In other words, it is our position that the validity of the Act may rest not only upon the nature of the business affected, but also upon the seriousness of the time and of the purpose for which the Act was passed, independently of the nature of the business.

Block v. Hirsch, 256 U. S. 135; 65 L. ed. 865.

In the above cited case this Honorable Court expressly held that particular circumstances varying in time and place may clothe any particular type of business with a public interest and justify the enactment of legislation in reference thereto which in ordinary times would not be permissible under the constitution.

> "Plainly, circumstances may so change in time or so differ in space,"

said this Honorable Court in the above cited case,

> "as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions as to insurance, in *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 58 L. ed. 1011, L. R. A. 1915 C, 1189, 34 Sup. Ct. Rep. 612; irrigation, in *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1083, 25 Sup. Ct. Rep. 676, 4 Ann. Cas. 1171; and mining, in *Strickley v. Highland Boy Gold Minn. Co.* 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 Ann. Cas. 1174. They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest (*Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.* 240 U. S. 30, 32, 60 L. ed. 507, 511, 36 Sup. Ct. Rep. 234), and that the public interest may extend to the use of land. They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or character to a public affair. See also *Noble State*

Bank v. Haskell, 219 U. S. 404, 110, 111, 55 L. ed. 112, 116, 117, 32 L. R. A. (N. S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487. . . . "Assuming that the end in view otherwise justified the means adopted by Congress, we have no concern, of course, with the question whether those means were the wisest, whether they may not cost more than they come to, or will effect the result desired. It is enough that we are not warranted in saying that legislation that has been resorted to for the same purpose all over the world is futile, or has no reasonable relation to the relief sought. *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259."

In other words, it is our position in reference to this matter that this legislation, from the standpoint of police power, may be and is justified both by reason of the nature of the business involved—viz: the banking business, and also by reason of the seriousness of the time at which it was enacted. The Act may validly rest upon either basis independently under the police power.

Police Power Covers All Appellant's Objections

In view of the foregoing discussion it is submitted the specific objections sought to be raised by the appellant do not require any separate extended discussion. The police power of the state is in itself a complete answer to all said objections, and under that power all the alleged interference with his property rights and impairment of his contracts may be and is justified.

It is established by authorities too numerous to require discussion that the police power of the state extends to and embraces the right, if need be, not only to interfere with one's normal property rights, but also to impair the obligations of contracts.

6 R. C. L. 187-189; 6 R. C. L. 347-348

Boston Beer Co. v. Massachusetts, 97 U. S. 25, 24 U. S. (L. ed.) 989;

Butchers' Union Slaughter-House Co. v. Crescent City Livestock Landing Co., 111 U. S. 746, 4 S. Ct. 652, 28 U. S. (L. ed.) 585;

St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 17 S. Ct. 243, 41 U. S. (L. ed.) 611, affirming 121 Mo. 298, 24 S. W. 591, 25 L. R. A. 161.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 U. S. (L. ed.) 979;

Northern Pac. Ry. Co. v. Minnesota, 208 U. S. 583, 28 S. Ct. 341, 52 U. S. (L. ed.) 630;

Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 S. Ct. 529, 52 U. S. (L. ed.) 828, 14 Ann. Cas. 560.

Act Should be Considered as a Whole

Also it is submitted that the Act in this case in all its component parts must be considered and construed as a whole in the light of its major purpose.

That purpose was to provide an opportunity and a method for an examination into all the banks of the State of South Carolina, with a view to restoring public confidence in the banks which were reopened and providing a procedure for the reorganization or liquidation of such banks as could not be reopened with safety. The Act was statewide in its operation and affected not only the bank in which appellant was interested. Some banks might be, and in fact were, perfectly solvent and were therefore reopened. Others, as subsequently was found out in this case, were not perfectly solvent, could not be reorganized and had to be liquidated.

However, the Act as a whole and the provisions complained of cannot be considered solely in the light of the facts which subsequently developed in the particular bank in which appellant had his deposit. Clearly it would have been and would be a great injustice and hardship upon the other people of the state, who have profited by the Act as a whole, to allow the appellant to upset the Act on account of some fancied (or real) injury to his individual rights. *Sic utere tuo ut alienum non laedas.*

In other words it is our position that the Act cannot be considered solely as a stay law though it has stay law provisions, nor as solely providing for a method for the liquidation of insolvent banks, nor as providing for the operation of banks as depositories. But the Act must be considered as it was, as an Act providing a period of grace for an examination into the banks of the state and providing for the reopening or reorganization or liquidation of the banks as should be found as a result of such examination best in the interests of the depositors therein.

No Merit in Appellant's Objections Even if Separately Considered

In any event it is submitted there is no real merit in any of the specific objections raised by appellant against the Act, even if separately considered.

(a) As to the alleged point (Arg. p. 4-5) that the Act deprives appellant of his property without due process by authorizing the Governor to appoint a Conservator-Receiver without notice to him, it is established by the above quoted authorities that there is no merit in this particular objection even in normal times.

State v. Scranton Title & Guaranty Co. Ida. 152, P. 189;

Title Guaranty & Surety Co. v. Idaho, 240 U. S. 136, 60 L. ed. 566;

Bushnell v. Leland (Conn. 1897) 17 S. Ct. 209, 164 U. S. 684, 41 L. ed. 598;

In re: Chetwood (Cal. 1897) 17 S. Ct. 385, 165 U. S. 443, 41 L. ed. 782

In re: Mandel, 224 Fed. 642

7 C. J. 480-482

This is a common method of providing for the administration of banks.

7 C. J. 480-482

Also the Comptroller of the Currency appoints the receivers for insolvent national banks "without a previous judicial ascertainment of the necessity for the appointment of the re-

ceiver and of the existence of the liabilities of the bank" (41 L. ed. @ 598) which action is uniformly upheld by this Court.

Bushnell v. Leland, 164 U. S. 684, 41 L. ed. 598
Kennedy v. Gibson, 75 U. S. 8 Wall. 498, 19 L. ed. 476;
Casey v. Galli, 94 U. S. 674, 24 L. ed. 168;
United States v. Knox, 102 U. S. 423, 26 L. ed. 216

(b) As to the objection (See Appellant's Arg. p. 5-6) that the Act enables the Conservator to use the assets of the bank to receive and pay out trust deposits, this it is submitted is merely a justifiable exercise of the states "power to compel beforehand, co-operation" which was recognized by this Court in the *Noble State Bank case.*

This provision was justified not only in the interest of the banks should they reopen so as to enable them to retain their customers, but also in the interest of the people because as was stated by the Court in the *Noble State Bank case*, there is "an almost compulsory resort of depositors to banks as the only available means for keeping money on hand".

Also the Act itself (Sec. 2 (e), Tr. 13, f. 23) specifically directs the Governor either to reduce the overhead expense of banks where such expense exceds the net income or to order liquidation. Hence it is submitted this objection is trivial.

(c) As to the contention that the Act impairs the obligation of appellant's contractual right to sue the stockholders on their double liability, this result (if existing at all) is merely an incidental consequence of the Act and the subsequent Act of May 16, 1933 (authorizing the appointment by the Governor of Conservator-Receivers) taken in connection with the 1929 Act (See 1932 Code S. 7855) as construed by the South Carolina decisions (*Branchville Motor Co. v. Adden*, 158 S. C. 90, 155 S. E. 277, *Ex Parte Love*, 158 S. C. 249) holding that only receivers could enforce that liability, and amounts in substance only to a change in the method of appointment of the receiver who enforces that liability.

As a matter of fact neither the Act nor the decision of the South Carolina Supreme Court directly prohibited appellant from suing the stockholders. In fact appellant would not have

had any independent right to enforce that liability (unless the receiver appointed under the 1929 [illegible] had refused to do so) even if the Act had not been passed. *Branchville Motor Co. v. Adden, supra; Ex Parte Love, supra.*

If it be conceded however that the necessary consequence of the Act as construed by the decision of the South Carolina Supreme Court to suspend appellant's contingent right to sue the stockholders—and we are inclined to that view, though the South Carolina Supreme Court has not directly passed on it,—nevertheless it is submitted that this was a justifiable exercise of the police power of the state.

The appellant made his deposit in the bank just as the stockholders acquired stock therein with the knowledge that the State might modify the enforcement of their respective rights and liabilities as the public interest might require.

Sherman v. Smith, 66 U. S. 587, 17 L. ed. 163
Farmers & Merchants Bank v. Federal Reserve Bank, 262 U. S. 649, 67 L. ed. 1157 (at 1164);
Bushnell v. Leland (Conn. 1897) 17 S. Ct. 209, 164 U. S. 684, 41 L. ed. 598.
Ex Parte Witt, 166 S. C. 1

A change in the method of enforcing the stockholders' liability does not impair the obligation of the contract.

Hill v. Merchants Mutual Ins. Co., 134 U. S. 515, 33 L. ed. 994;
Henley v. Myers, 215 U. S. 373, 54 L. ed. 240;
Pittsburg Steel Co. v. Baltimore Equitable Soc., 226 U. S. 445, 57 L. ed. 297.

Also in view of the fact that the Conservator-Receivers are now proceeding to enforce the stockholders liability, under orders of the Governor and of the Court, this point is largely academic.

(d) The same reasoning applies to appellant's objection that the Act impairs the obligation of his contractual right to sue the Bank for his deposit, and hence this objection need not be further discussed.

The provision of this temporary period of immunity for the benefit of the banks from suits of all kinds, is in many respects

analogous to the like provision in favor of the estates of decedents which exist in many states and in the State of South Carolina and are universally recognized as valid.

11 R. C. L. p. 214,
S. C. Code 1932, Sec. 8993.

Also it is to be noted that the Act only prohibits suits against the banks "without first obtaining the written approval of the Governor" (R. p. 15, f. 25), and it may fairly be presumed that the Governor would give his approval to the bringing of any appropriate and timely suits.

Likewise it is held that stay laws passed in times of emergency and panic are valid.

10 R. C. L. 1248

Chadwick v. Moore, 8 Watts & S. (Pa.) 49, 42 Am. Dec. 267.

II.

Appellant's Objections Go Only to a Permissible Change in the Procedure for the Liquidation of Insolvent Banks

Furthermore, it is submitted, that so far as appellant claims that the Bank is insolvent and should be liquidated, the whole effect of the Act and of the subsequent statute and proceedings (of which this Court should take judicial notice (*Abie State Bank v. Bryan*, 282 U. S. 765, 75 L. ed. 690; *Hanley v. Donoughue*, 116 U. S. 1, 6, 29 L. ed. 535, 537, 6 S. Ct. 242; *Lloyd v. Matthews*, 155 U. S. 222, 227, 39 L. ed. 128, 130, 15 S. Ct. 70) is to change the method of the appointment of the Receiver from appointment by the Court upon nomination of the depositors to appointment by the Governor, which is a permissible change of remedy without depriving one of his property or impairing the obligation of his contracts.

Sturges v. Crowinshield, 4 Wheat. 122, 4 U. S. (L. ed) 529;
Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 U. S. (L. ed) 773;
Bronson v. Kinzie, 1 How. 311, 11 U. S. (L. ed.) 143;
Ogden v. Saunders, 12 Wheat. 213, 6 U. S. (L. ed.) 606;

Planters' Bank v. Sharp, 6 How. 304, 12 U. S. (L. ed.) 447;

Penniman's Case, 103 U. S. 714, 26 U. S. (L. ed.) 602;

Wilson v. Standefer, 184 U. S. 399, 22 S. Ct. 384, 46 U. S. (L. ed) 612;

Waggoner v. Flack, 188 U. S. 595, 23 S. Ct. 345, 47 U. S. (L. ed) 609;

Bernheimer v. Converse, 206 U. S. 516, 27 S. Ct. 755, 51 U. S. (L. ed) 1163, 11 Ann. Cas. 589;

State v. Carew, 13 Rich. L. (S. C.) 498, 91 Am. Dec. 245;

Wardlaw v. Buzzard, 15 Rich. L. (S. C.) 158, 94 Am. Dec. 148;

Randall v. Krieger, 23 Wall. 137, 23 U. S. (L. ed) 124

Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 21 S. Ct. 703, 45 U. S. (L. ed) 994.

6 R. C. L. 347-348

6 R. C. L. 356-357

It may be conceded that so far as solvent banks are concerned, the Act effects a substantial change in the rights of such banks and the depositors therein. So far as insolvent banks however are involved—and the appellant has throughout contended that the bank should be liquidated—the Act merely affects a slight change in the procedure for liquidation.

The whole effect of the present Act in regard to the liquidation of a bank is to change the method of the appointment of the receiver from an appointment by the Court upon the nomination of the depositors to an appointment by the Governor. It is submitted, however, that this was and is an entirely proper and permissible change, and probably represented in part, the realization on the part of the Legislature of the impractibility of calling together in any reasonable length of time, the depositors of this and other banks who, in many cases, would number thousands, and would be scattered all over the State of South Carolina.

Also it is to be noted that under the subsequently adopted Act passed by the South Carolina Legislature on May 16 (copy of which is hereto annexed in the appendix), the Conservator was expressly given the right to "apply to a court of competent jurisdiction for directions and instructions on questions arising in the liquidation of any such bank", and under such Act the Conservator in this case has, in fact, applied to the Court and is now receiving instructions from the Court in the liquidation of this bank. Hence the whole effect of the present procedure as compared with the previously prevailing procedure in the State of South Carolina for the liquidation of banks, as to which the appellant, makes no complaint, is that under the present procedure the Governor appoints the Conservator-Receiver, who applies to the Court for instructions in the liquidation of the bank, whereas, under the former procedure, the conservator was appointed by the Court upon the nomination of the depositors. It is respectfully submitted that this is a case where this Honorable Court shall not concern itself with the wisdom of the passage of such legislation, but will leave that matter to the State Legislature (See *Block v. Hirsch, supra; Chicago R. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328).

Such a change of remedies does not in any proper sense deprive the appellant of his property without due process of law or illegally impair the obligation of his contracts.

> "While the legislature may not withdraw all remedies, and thus in effect destroy the contract, modes of procedure in the courts of a state are so far within its control that a particular remedy existing at the time of the making of a contract may be abrogated altogether without impairing the obligation of the contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away. This is the rule even though the new or the remaining remedy be less convenient than that which was abolished, or less prompt and speedy; however, on this phase of the rule there is some conflict, for it has been held that the altera-

tion must not, so far as prior contracts are concerned, appear on the face of the statute to be enacted to render the remedies less efficient or more dilatory than those in force when the contract was made. It is enough if the contract is left with the same force and effect, including the substantial means of enforcement which existed when it was made, or sufficient to enforce the contract."

"While it is conceded that a distinction exists between alterations of the remedy which are deemed to be legitimate and those which, under the form of modifying the remedy, impair substantial rights, generally speaking, the difficulties in the way of stating a rule render it imperative that every case be determined on its own particular circumstances; and the question whether a change of remedy impairs a substantial right in the last analysis is ordinarily one as to reasonableness. A test frequently advanced is that only such repeals or changes of any of the remedies existing as to the enforcement of a contract as serve to lessen the value of the agreement, or which substantially interfere with, or abridge, obstruct or unreasonably delay rights thereunder, impair the obligation."

6 R. C. L. @ p. 359-361, Citing:

Edwards v. Kearzey, 96 U. S. 595, 24 U. S. (L. ed.) 793;

Myers v. Knickerbocker Trust Co., 139 Fed. 111, 71 C. C. A. 199, 1 L. R. A. (N. S.) 1171;

Tennessee v. Sneed, 96 U. S. 69, 24 U. S. (L. ed.) 610;

Brine v Hartford F. Ins. Co., 96 U. S. 637, 24 U. S. (L. ed.) 858;

Seibert v. Lewis, 122 U. S. 284, 7 S. Ct. 1190, 30 U. S. (L. ed.) 1161;

Harrison v. Remington Paper Co., 140 Fed. 385, 72 C. C. A. 405, 5 Ann. Cas. 314, 3 L. R. A. (N. S.) 954

III.

Appellant's Authorities Inapplicable to the Case at Bar

We have carefully considered the authorities cited by the appellant in his argument, but it is submitted that none of them have any real bearing upon the question before this Court.

None of the authorities from this Court cited on p. 4 (77 L. ed. 78; 80, 77 L. ed. 254, 77 L. ed. 125), relate to banks. The case of *Sterling v. Constantine*, quoted from by appellant in his argument (p. 6) dealt with the action of the Governor of Texas (Sterling) in undertaking to close the oil wells of the State of Texas, and to oust the courts of their jurisdiction and to substitute martial law therefor. The distinction between that case and the case at bar is too apparent for discussion. Also in that case this Honorable Court in its decision recognized the "broad discretion" which resides in the people of a state in the passage of legislation dealing with matters within the police power, saying:

> "In the performance of its essential function, in promoting the security and well-being of its people, the State must, of necessity, enjoy a broad discretion. The range of that discretion accords with the subject of its exercise. *Jacobson v. Massachusetts*, 197 U. S. 11, 31, 49 L. ed. 643, 651, 25 S. Ct. 358, 3 Ann. Cas. 765; *Standard Oil Co. v. Marysville*, 279 U. S. 582, 584, 73 L. ed. 856, 859, 49 S. Ct. 430; *Ohio Oil Co. v. Conway*, 281 U. S. 146, 159, 74 L. ed. 775, 781, 50 S. Ct. 310",

Also the cases cited from the State of South Carolina by the appellant in his argument (p. 5) (143 S. C. 516, 145 S. C. 1, 136 S. C. 5 11), in support of the proposition that the assets of an insolvent bank are the property of its depositors and creditors, merely held in effect that such assets constitute a trust fund for the benefit of the depositors and other creditors, the same to be administered in accordance with the laws provided by the state for the benefit of such depositors and other creditors. They do not hold, as is apparent even from the quotation from the case of *Rice v. the City of Columbia*, 143 S. C. 516, contended in the appellant's argument (p. 5), that the

assets of such banks are in any proper sense the individual property of any special depositor. In other words, appellant's rights in such assets, as well as the rights of all of the other depositors, are likewise subject to the equal rights of the other depositors in such assets.

Also the case of *First National Bank of San Jose v. State of California*, 262 U. S. 366, 67 L. ed. 1030, merely holds that a state has no authority to regulate or dissolve the contracts of national banks, the point of the case being that the State Legislatures have no authority over the national banks, which are Federal agencies, and the case does not in the remotest degree touch the case at bar, for the reason, among many others, that in the case at bar the bank was a state bank.

Also the case of *Buchanan v. Warley*, 245 U. S. 59, 69 L. ed. 149, cited and quoted from by appellant in his argument (p. 12), involved the constitutionality of a city ordinance which prohibited the purchase of land by colored persons, and did not in any sense involve any question in anywise related, as we conceive it, to the question before the Court in the case at bar. In that case, also, this Honorable Court again recognized the wide discretion vested in the state authorities to pass laws for the promotion of the health, safety and welfare of its citizens.

> "The authority of the state to pass laws in the exercise of the police power, having for their object the promotion of the public health, safety and welfare",

said the Court,

> "is very broad, as has been confirmed in numerous and recent decisions of this Court. Furthermore, the exercise of this power, embracing all the legislation of a local character, is not to be interfered with by the courts where it is within the scope of legislative authority and the means adopted reasonably tend to accomplish a lawful purpose."

It is respectfully submitted that in general the argument of the appellant and the authorities therein cited either merely state accepted and undisputed principles, or they are irrelevant to the real issue before this Court.

SUMMARY AND CONCLUSION

By way of summary it is earnestly and respectfully submitted that the Act herein complained of was a valid exercise by the State of South Carolina and its legislative power over the banks of the state for the promotion of the welfare of its people.

The Act was intended to provide a method and an opportunity for an investigation of the banks of the state, for the purpose of determining which of the said banks should and could be allowed to continue operations, unrestricted; which of the said banks might be reorganized; and which of the said banks were insolvent and should be liquidated. In view of the existing financial emergency in the banking world, it is earnestly submitted that such was a highly lawful purpose for the passage of the Act, and that the Legislature was, in fact, under imperative duty to take some means to accomplish this purpose. The provisions of the Act in question clearly show that the means adopted reasonably tended to accomplish that lawful purpose. Hence, under the authorities hereinbefore cited, it was clearly within the power of the State of South Carolina, under its police power, to enact the said legislation even if, as a result thereof, some of appellant's normal property or contractual rights might be to some extent, affected. *"Salus populi suprema lex est."*

As a matter of fact, however, the only effect of the Acts in question as construed by the State Supreme Court, so far as appellant's rights are concerned, is to change the method of the appointment of the receiver for the bank by having such receiver appointed by the Governor instead of being nominated by the depositors and appointed by the court. Such change in method of enforcing appellant's alleged rights in the assets of the bank or as against the stockholders thereof, is clearly permissible not only under the police power, but as being a change in the method of the enforcement of rights which does not substantially impair their value.

It is earnestly submitted that it would be contrary to the basic principles of government as established by this Honorable Court and all of the standard authorities, to hold that the passage of this Act, under the circumstances of this case, was futile. The basic and fundamental objects for the organization of civil government, as recognized by all the authorities, are (1) national defense; (2) the administration of justice; and (3) the general welfare. It is necessary, in the interest of the performance of this basic purpose, for the very existence of the government, that the legislative branch of such government shall have wide discretion in the exercise of its judgment for the promotion of the general welfare. This Court has on many occasions, from the earliest time down to the present, repeatedly announced and applied this doctrine. Under the constitutional form of government, such as that under which we live in this country, it is of course necessary that this Honorable Court should have the ultimate right to declare unconstitutional such Acts of Congress or of the State Legislatures as really transgress the basic and fundamental rights of the people as established in the constitution; however, in the exercise of that power it is respectfully submitted, as has been frequently stated by this Honorable Court, the Court should be very circumspect and should not declare state statutes designed for certain needs unconstitutional unless it is clear that the means adopted do not reasonably tend to promote the needs for which the legislation was enacted.

This is a case, it is respectfully submitted, where it is clear that the purpose in view was lawful and proper, and the means adopted tended to accomplish that purpose; and hence said Acts, as construed by the South Carolina Supreme Court, should be upheld, and the judgment of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

JOHN M. DANIEL, *Attorney General,*
MELTON & BELSER,
IRVINE F. BELSER,
Attorneys for Appellees.

APPENDIX

EXHIBIT "A"

AN ACT to provide for the liquidation of banks or banking institutions after a conservator has been appointed

Section 1: Be it enacted by the General Assembly of the State of South Carolina: When the Governor shall conclude, after advising and consulting with the Board of Bank Control, that any bank for which a Conservator has been or hereafter shall be appointed, is insolvent or in imminent danger of insolvency and it is necessary in order to protect the interest of depositors and creditors to liquidate such bank, he shall order the liquidation thereof; and when liquidation shall have been so ordered the same shall be under and by the Conservator appointed for such bank, and shall continue until the liquidation of said bank has been completed. And such Conservator shall be vested with the same powers and duties as receivers of banks under existing laws, except as in his discretion the Governor acting with the Board of Bank Control shall fix or limit the liquidating expenses of such bank or banking institution. The liquidation of all such banks shall be under such rules and regulations as may be prescribed by the Governor after consulting and advising with the Board of Bank Control, and the Conservator shall have the right to apply to a court of competent jurisdiction for direction and instruction on questions arising in the liquidation of any such bank.

Section 2: The depositors of any such bank in liquidation shall be authorized by the vote of a majority present at a meeting of such depositors called by such Conservator on order of the Governor after ten days' notice to each depositor by mail, at his last known post office address, to select a committee of not exceeding three depositors to confer and advise with the Conservator and the Board of Bank Control, in the liquidation of said bank. It shall be the duty of the Conservator to call the depositors together for the

purpose of electing said committee and she is hereby requested to call said meeting.

Section 3: That all appointments of Conservators heretofore made by the Governor by and with the advice of said Board of Bank Control shall be and hereby are ratified and confirmed.

Section 4: The term "banks" as used in this Act shall be construed to include cash depositories, building and loan associations and other institutions doing a banking business.

Section 4-A: That the terms hereof shall not be applicable to banks, at present, in liquidation under a receivership appointed by the order of Court and this Act shall not annul, invalidate or remove any Receiver engaged, at present, in the liquidation of any bank.

Section 5: All Acts or parts of Acts inconsistent with this Act are hereby repealed.

Section 6: This Act shall take effect immediately upon its approval by the Governor.

Approved the 16th day of May, 1933.

I. C. BLACKWOOD,
Governor

EXHIBIT "B"

STATE OF SOUTH CAROLINA

Office of the Governor

Being of the opinion and having concluded after advising and consulting with the Board of Bank Control that the Central Union Bank of South Carolina, for which a Conservator has heretofore been appointed, is insolvent or in imminent danger of insolvency; that the overhead expense of said bank exceeds the net income thereof, and that it is necessary in order to protect the interest of the depositors and creditors to liquidate said bank

IT IS ORDERED:

1. That said bank be liquidated, such liquidation to be under and by the Conservator heretofore appointed for said bank with all powers and duties as provided by law.

2. That the said Conservator proceed promptly with the said liquidation, and that he call together the depositors, after ten days' notice as required by law, for the purpose of selecting a depositors' committee.

Given under the hand of the Governor and the Seal of the State of South Carolina this 20th day of June, 1933.

(Signed) I. C. BLACKWOOD,
Governor

This is to certify that the above is a true and accurate copy of Order issued by the Governor of the State of South Carolina as to the liquidation of The Central Union Bank of South Carolina, the original Order on file with S. J. Zimmerman, Conservator, having been exhibited to me.

Columbia, S. C.
June 22, 1933.

.....
J. B. Baxter, Notary Public for S. C.